-1500 FILE COPY

FILED
MAY 7 1973
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-1500

GENERAL ELECTRIC COMPANY - - Petitioner

versus

LOCAL 783, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO - - - Respondent

---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MORTON J. HOLBROOK
RALPH W. WIBLE
100 St. Ann Street
Owensboro, Kentucky 42301
Counsel for Petitioner

May 7, 1973

WESTERFIELD-BONTE CO., INC., 619 W. KENTUCKY, LOUISVILLE, KY.

INDEX

PAGE

Authorities Cited ..... iii– v

Opinion Below 1

Jurisdiction 2

Questions Presented 2

Statutory Provisions Involved 3

Statement of the Case 3–10

Reasons for Granting the Writ 10–24

1. The Decision Below Conflicts With the Decisions of Other Courts of Appeals as to Application of the Parol Evidence Rule to Collective Bargaining Agreements 10–13

2. The Decision Below Conflicts in Principle With Applicable Decisions of This Court Which Hold That Collective Bargaining Agreements Are Not Governed by Common Law Contract Rules 14

3. The Decision Below Raises Significant Questions as to What Evidence May Be Considered in Interpreting Collective Bargaining Agreements. 15–17

4. The Restrictive Approach to the Interpretation of Contracts Adopted by the Court Below Has No Application to Collective Bargaining Agreements 18–22

5. The Decision Below Raises Significant Questions Concerning Abuse of Appellate Procedure By Requiring Double Appellate Review and the Opinion Reconsidering a Prior Decision on the Merits Is in Conflict With Applicable Decisions of This Court 22–24

Conclusion 25

PAGE

Appendix 27–60

Order Denying Mandamus 27–28

Findings of Fact and Conclusions of Law by the United States District Court for the Western District of Kentucky 29–46

Judgment of the United States District Court for the Western District of Kentucky 47

Opinion of the United States Court of Appeals for the Sixth Circuit 48–58

Judgment of the United States Court of Appeals for the Sixth Circuit 59

Order Denying Petition for Rehearing 60

AUTHORITIES CITED

Cases:

PAGE

Angel v. *Bullington*, 330 U. S. 183 24

Anson v. *Hiram Walker & Sons, Inc.*, 222 F. 2d 100 (7th Cir. 1955) cert. denied 350 U. S. 840 (1955); rehearing denied 248 F. 2d 380 (7th Cir. 1957) .. 11

Black v. *Boyd*, 248 F. 2d 156 (6th Cir. 1957) 23, 24

Block v. *Commissioners*, 99 U. S. 686 (1878) 22

Brownell v. *Chase Nat. Bank*, 352 U. S. 36, 39 (1956) 24

Burdick v. *Harbor Spring Lumber Co.*, 167 Mich. 673, 133 N. W. 822 (1911) 22–23

Columbia Broad. Sys. Inc. v. *American Record. & Broad. Ass'n.*, 414 F. 2d 1326 (2d Cir. 1969) 14

Drake Bakeries v. *Local 50*, 370 U. S. 254 (1962) ... 14

ExParte, Bakelite Corp., 279 U. S. 438 (1929) 22

Forrest Industries, Inc. v. *Local U. No. 3-436 Int. Woodworkers*, 381 F. 2d 144 (9th Cir. 1967) 13

General Teamsters, Chauffeurs & Helpers U. v. *Blue Cab Co.*, 353 F. 2d 687 (7th Cir. 1965) 13

Hollywood Circle v. *Dept. of Alcoholic Bev. Con.*, 55 Cal. 2d 728, 13 Cal. Reptr. 104, 361 P. 2d 712 (1961) 22

Hurst v. *W. J. Lake & Co.*, 141 Or. 306, 16 P. 2d 627, 89 A.L.R. 1222 (1932) 20, 21, 22

Independent Petroleum Workers v. *American Oil Co.*, 324 F. 2d 903 (7th Cir. 1963), aff'd Per Curiam by eq div ct. 379 U. S. 130 (1964), rehearing denied 379 U. S. 985 (1965) 13

In re Previn, 204 F. 2d 417 (1st Cir. 1953) 23, 24

Internat'l Union of Electrical, Radio & Machine Workers, AFL-CIO v. *General Electric Co.*, 332 F. 2d 485 (2d Cir. 1964), cert. denied 379 U. S. 928 (1964) 11–12

Langer v. *Iowa Beef Packers, Inc.*, 420 F. 2d 365 (8th Cir. 1970) 20

Local U. No. 483 Int. Bro. of Boilermakers, etc. v. *Shell Oil Co.*, 369 F. 2d 526 (7th Cir. 1966) 13

Cases: (Cont'd)

PAGE

Louis v. *Brown Township*, 109 U. S. 162 (1883).... 22

Ludwig Honold Mfg. Co. v. *Fletcher*, 405 F. 2d 1123, (3rd Cir. 1969)..... 18

N.L.R.B. v. *Gulf Atlantic Warehouse Co.*, 291 F. 2d 475 (5th Cir. 1961).....11, 12, 13

Nicoll v. *Pittsvein Coal Co.*, 269 **Fed.** 968, 971 (2d Cir. 1920)..... 19

Overstreet v. *County of Butte*, 20 Cal. Reptr. 631, 370 P. 2d 335 (1962)..... 22

Pacific Northwest Bell Tel. Co. v. *Communications Workers of A.*, 310 F. 2d 244 (9th Cir. 1962)... 13

T.-C.E. Union v. *Union Pacific R. Co.*, 385 U. S. 157 (1966)..... 14

United Brick & C. Wkrs. Loc. 486 v. *Lee Clay Pr. Co., Inc.*, Ky., 488 S. W. 2d 331 (1972)..... 16

U. S. v. *U. S. District Court*, 444 F. 2d 651 (6th Cir. 1971), aff'd 407 U. S. 297 (1972)..... 22

United Steelworkers of Amer. v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960).....11, 12, 13, 15

Watson v. *International Bro. of T., C., W., & H. of America*, 399 F. 2d 875 (5th Cir. 1968)..... 16

Texts:

Annot., 21 A.L.R. 3d 206 (1968)..... 23

3 CORBIN, CONTRACTS, § 535 (1960).....21, 22

Mittenthat, *Past Practices in the Administration of Collective Bargaining Agreements*, 59 MICH. L. REV. 1017 (1961).....15–16, 17

RESTATEMENT, CONTRACTS, § 235, COMMENT *e* (1952). 18

Summers, *Individual Rights and Arbitration*, 37 N.Y.U.L. REV. 362, (1962)..... 17

IX WIGMORE, EVIDENCE, § 2463 (3rd Ed. 1940).....21, 22

3 WILLISTON, CONTRACTS (REV. ED. WILLISTON AND THOMPSON 1936)

§ 628..... 18

§ 648..... 18

§ 650.....19–20, 22

§ 652.....18–19

§ 660..... 19

Statutes:

	PAGE
28 U.S.C. § 1254 (1)	2
Labor Management Relations Act of 1947 § 301(a), 29 U.S.C. § 185(a)	3, 8

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. _____

GENERAL ELECTRIC COMPANY, - - *Petitioner,*

v.

LOCAL 783, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO, - - - *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, General Electric Company, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered on January 5, 1973.

OPINION BELOW

The opinion of the Court of Appeals, 471 F. 2d 751, and the Order denying rehearing (not reported), appear in the Appendix hereto at pages 48 through 60. The Findings of Fact and Conclusions of Law rendered by the District Court for the Western District of Kentucky (not reported), appear in the Appendix at pages 29 through 46.

JURISDICTION

The date of the judgment in the Court of Appeals for the Sixth Circuit and the date of its entry was January 5, 1973. A timely petition for rehearing *en banc* was denied on February 7, 1973, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that the parol evidence rule rendered inadmissible evidence of past practice and of agreements made during bargaining sessions that the establishment of the Singapore facility did not violate the collective bargaining agreement?

2. Was it error to hold that establishment of the Singapore facility violated the only plain meaning of the collective bargaining agreement, thereby excluding from consideration the existing circumstances, bargaining history, past practice and usage as evidence of another meaning?

3. Was the Sixth Circuit's denial of a petition for a writ of mandamus to compel trial before a jury a holding on the merits and thus binding on that Court when the action was appealed after trial?

STATUTORY PROVISIONS INVOLVED

§ 301(a), Labor Management Relations Act, 61 Stat. 156 (1947), Title 29, U.S.C.:

> "§ 185. Suits by and against labor organizations—Venue, amount and citizenship
>
> "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

STATEMENT OF THE CASE

General Electric Company established a plant in the Republic of Singapore for the manufacture of parts of radio and television receiving tubes. The Union brought this action under § 301 of the Labor Management Relations Act claiming that the Singapore operation breached the "farming out" clause of the collective bargaining agreement between Local 783 and General Electric relating to its Owensboro, Kentucky operations.

General Electric manufactures radio and television receiving tubes in Owensboro, Kentucky. In 1970 it established the Singapore facility to make parts for some of these tubes. The Company built and is op-

erating the Singapore plant in order to retain its market for tubes by meeting offshore competition (which has driven 7 U. S. receiving tube manufacturers out of business) and to preserve jobs for its Owensboro employees. The Union contends that this was a violation of Article XVI § 5 of the collective bargaining agreement, which provides:

> "There shall be no farming or letting out or transfer of machinery or work for the purpose of curtailing or reducing employment in the plant."

The contract excludes disputes under this clause from arbitration.

The "farming out" clause has appeared in every agreement between the parties since their first contract in 1945. Shortly before the 1945 contract, General Electric had bought the Owensboro works from Ken-Rad Lamp Company. The immediately preceding contract between Ken-Rad and the Union had a different clause providing:

> "4. The Company agrees that it will not farm out any of its work to any other plant or plants for the purpose of curtailing or reducing employment in its plants covered by this contract."

In the years since 1945, General Electric had moved production from its Owensboro plants to its plants in other areas, and from plants in other areas to its Owensboro plants without a grievance ever having been made that this violated the "farming out" clause.

In the early months of 1970, the parties were engaged in contract negotiations. At the bargaining session of January 20, the Union representatives and company representative, McQueeney, discussed the meaning and application of the "farming out" clause to moves in and out of Owensboro as developed during 25 years of practice in the following colloquy:

"C.
(McQueeney) Suppose a new business was thinking of coming in here and we told them of the good work climate and people, and then told them that if they were to move equipment in they should know they could never move it out to another of their locations. He'd ask how many other GE locations have the problem and we'd say none. He'd say goodbye.
U.
(Dugger) That gets away from farmout. Besides that's not farmout in GE.
C.
(McQueeney) Can you see how unattractive we could be to a new business? Our current language says we can't farm out for the purpose of curtailing or reducing the workforce. Your proposal seems to say that we couldn't move the equipment to Springfield.
U.
(Harrison) Even under our language you'd be breaking the agreement when you sent stuff to Springfield since it would reduce some work here, if we meant farmout to include within GE moves. We don't mean that.
U.

(Arnold) There's quite a difference between farming out and transferring work between locations. We haven't made a stink about that.
U.
(Warren) Look at your thick film move to Syracuse. We didn't complain about that either.
U.
(Erwin) We're aware of the changing realities of a business which says some things come in here from other GE locations and go out to other GE plants. What we want to do away with is farming work out to Faith Tool & Die, or a place like "Knuckles" when we've got equipment and people in here who can do the work, and we think cheaper too. We do enough rework at EDC on farmed out stuff to offset the cost of doing it here to begin with, to specifications without rework.
C.
(McQueeney) I'm just not aware of the fact that this does, in fact, go on.
U.
(Erwin) Well, it does, and that's what we don't like. We've never complained about transferring stuff to other GE locations. We sent those base staking machines to Tell City and they sent the bases back here for processing for sometime before the machines were finally returned here. We didn't cry about that, because that's not farm-out."

On January 21, the company newspaper formally announced to the employees that the Singapore operation would be started later that year.

The meaning of Article XVI § 5 was again discussed and agreed upon at the session of February 3.

"C.

(McQueeney) Let's take up where we left off at our last meeting. I believe it was on:

Article XVI—Section 5—Farming Out

It must be pretty evident after our last discussion just how important our concern is for this language. Facing the continuing decline of the core business we want to be able to attract other businesses to take its place. There are two ways we go about getting new employment opportunities in to Owensboro. First, we continually look for ways to add new product innovations within the Tube Department such as we did when such things as DDO and Microwave Products were added. A second effort we make is to search for new departments to move into Owensboro such as the one we announced recently in the Headliner. Of course, this contract and therefore this farmout language would not affect a new product department such as the one announced, but the very existence of this clause does nothing to enhance the attractiveness of the Owensboro location. Even decisions to add to the Tube Department must involve review and concern for the current farmout provision; that is why I explored so thoroughly with you your interpretation of the current farmout language. First, let me say that we are not willing to revise the current language as you propose; we are simply unwilling to broaden the current spirit and intent of this language. Second, personally I am not happy with even the current language but considering the arbitration rulings which give it definition[1] and considering your interpretation that

[1]This clause has not been arbitrable since the 1966 agreement.

this language in no way, shape or form applies to the transfer of work or equipment from Owensboro to anyplace within the General Electric Company, on that basis, I'm willing to keep the language we have in the agreement. Have I correctly stated at least that part of your interpretation of this language correctly that is, that the language in no way applies to the transfer of work or equipment from Owensboro to any other location in the General Electric Company?

U.

(Arnold) That's right.

U.

(Erwin) I agree."

The District Court admitted in evidence this settled practice of 25 years and the quoted agreement of the parties as to the meaning of the farmout clause. The Court of Appeals held this reversible error.

It was against the background of the commitments quoted above that the collective bargaining agreement was executed on March 3.

Although the announcement was made on January 21 and the first shipment of equipment to Singapore was on March 5, this action was not filed until November 5, 1970.

The Complaint brought in the state court prayed only for injunctive relief. General Electric removed to the United States District Court for the Western District of Kentucky, invoking that Court's jurisdiction under Section 301 of the Labor Management Relations Act of 1947. The District Court, after a hearing held on November 10, 1970, dissolved the state

court's temporary restraining order and denied a temporary injunction.

There was no further action until the District Court on June 16, 1971, ordered that a pre-trial conference be held on August 19. The pre-trial conference order set the case down for trial before the Court on September 16. On September 8, Respondent filed a Motion for Leave to Amend its Complaint to include (1) a prayer for damages of over $4 million, and (2) a demand for jury trial.

The District Court granted leave to amend on condition that the action proceed to trial without a jury. It also granted Respondent additional time to file a brief on its claim of right to a jury and reset the trial to November 10. After briefing, the Court again declined to allow a jury trial.

On October 26, Local 783 brought an original mandamus action in the Court of Appeals against the District Judge and General Electric to compel the Judge to grant a jury trial. General Electric objected to the mandamus petition, arguing to the merits that the District Court had not exceeded its discretion in placing a condition on the granting of leave to amend. It also argued that the extraordinary writ of mandamus was not appropriate in this case. The Court of Appeals denied mandamus in an opinion directed only to the merits rather than to the inappropriateness of the remedy. See page 27 of Appendix hereto.

Local 783 then sought a stay of the trial on the grounds that it was preparing a petition for certiorari to review the denial of mandamus. The stay was

denied by the District Court, by the Court of Appeals for the Sixth Circuit, and by Circuit Justice Potter Stewart. Local 783 did not seek review by certiorari.

The case then went to trial. The District Court held evidence of practice, usage and bargaining history was admissible and found that the parties did not intend the "farming out" clause to prohibit transfers to other GE plants. It further found that General Electric did not establish the Singapore operation "for the purpose of reducing employment," but that the purpose of establishing the plant was to preserve Owensboro jobs that would otherwise be lost to offshore competition.

The Court of Appeals reversed the judgment rendered by the District Court on the grounds that its denial of mandamus did not decide the jury issue on the merits, and that it was error to grant leave to amend on the condition that the trial be by the Court. It reversed on the additional grounds that the "farming out" clause had but one plain meaning, and that it was error to admit evidence for the purpose of interpreting the collective bargaining agreement.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With the Decisions of Other Courts of Appeals as to Application of the Parol Evidence Rule to Collective Bargaining Agreements.

This case involves conflicts between the Fifth and Sixth Circuits as against the Seventh and Ninth Circuits involving an important phase of administration of the national labor laws, i.e., whether parol evidence

may be used to construe collective bargaining agreements.

This Court has held that a collective bargaining agreement is "more than a contract; it is a generalized code to cover a myriad of cases which the draftsman cannot wholly anticipate." *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 at 578 (1960).

In holding that the parol evidence rule applies to collective bargaining agreements to prohibit the admissibility of the bargaining session statements, past practices and usages, the Sixth Circuit relied upon the following decisions of other Courts of Appeals: *N.L.R.B.* v. *Gulf Atlantic Warehouse Co.*, 291 F. 2d 475 (5th Cir. 1961); *Anson* v. *Hiram Walker & Sons, Inc.*, 222 F. 2d 100 (7th Cir. 1955) cert. denied 350 U. S. 840 (1955), rehearing denied 248 F. 2d 380 (7th Cir. 1957); *International Union of Electrical, Radio and Machine Workers, AFL-CIO* v. *General Electric Co.*, 332 F. 2d 485 (2nd Cir. 1964), cert. denied 379 U. S. 928 (1964).

Only the Fifth Circuit decision in *N.L.R.B.* v. *Gulf Atlantic Warehouse, supra,* supports the Court below. *Anson* v. *Hiram Walker & Sons, Inc., supra* (7th Cir. 1955), was decided before this Court distinguished collective bargaining agreements from other contracts in *United Steelworkers of America* v. *Warrior & Gulf Navigation Co., supra,* and it is no longer the law even in the Seventh Circuit. See cases cited at p. 13 below.

In the Second Circuit case, *International Union of Electrical, Radio and Machine Workers, AFL-CIO* v.

General Electric Co., supra, the Court did not hold that the parol evidence rule applies to collective bargaining agreements; it simply held that a court will not consider bargaining history where it touches upon both the questions of arbitrability and the merits of a dispute. Resolution of such factual issues is for the arbitrator rather than the court. This rule, designed to strengthen the arbitration process, has no application where the parties have excluded a dispute from arbitration as they have here.

The Court below relied on *Warrior & Gulf* as holding that evidence of bargaining history was not to be used in determining the meaning of an arbitration clause, and the Court interpreted this to mean that parol evidence is admissible only *"when the contract is in need of interpretation."* This was the same error the Fifth Circuit had made in *N.L.R.B.* v. *Gulf Atlantic Warehouse.*

Both Circuits erred in finding that this Court had applied the parol evidence rule in the *Warrior & Gulf* case. *Warrior & Gulf* did not apply the parol evidence rule. Instead, it announced a rule as to the *weight* of evidence necessary to find an intent to exclude an issue from arbitration. In order to further the federal policy favoring arbitration, *Warrior & Gulf* held that "doubts should be resolved in favor of arbitration" and "only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." This rule for construction of arbitration clauses is entirely different from those for other clauses of collective bargaining contracts. The *Warrior & Gulf* opinion

recognized that once a tribunal reaches the merits of an issue, it is not bound by common law rules, by noting that the words of a collective bargaining agreement cannot be the "exclusive source of rights and duties", and that the "common law of the shop" furnishes context to the agreement. 363 U. S. at 579, 580.

Decisions of the Ninth and Seventh Circuits conflict with the Sixth Circuit's decision in this case and the Fifth Circuit's in *Gulf Atlantic Warehouse*. In *Forrest Industries, Inc.* v. *Local U. No. 3-436, Int. Woodworkers,* 381 F. 2d 144 (9th Cir. 1967) evidence of past practices was considered on the basis of this Court's view of the special nature of collective bargaining agreements as expressed in *Warrior & Gulf*. Also, the Ninth Circuit's earlier decision in *Pacific Northwest Bell Tel. Co.* v. *Communications Wkrs. of A.,* 310 F. 2d 244 (9th Cir. 1962) and the Seventh Circuit decision of *Independent Petroleum Workers* v. *American Oil Co.,* 324 F. 2d 903 (7th Cir. 1963), aff'd Per Curiam by eq div ct. 379 U. S. 130 (1964), rehearing denied 379 U. S. 985 (1965); *General Teamsters, Chauffeurs & Helpers U.* v. *Blue Cab Co.,* 353 F. 2d 687 (7th Cir. 1965); and *Local U. No. 483 Int. Bro. of Boilermakers, etc.* v. *Shell Oil Co.,* 369 F. 2d 526 (7th Cir. 1966) hold that bargaining history, past practices and usage may be considered in interpreting this special class of agreements.

These conflicting decisions justify the grant of certiorari to review the judgment of the Sixth Circuit.

2. The Decision Below Conflicts in Principle With Applicable Decisions of This Court Which Hold That Collective Bargaining Agreements Are Not Governed By Common Law Contract Rules.

This Court has held that "[a] collective bargaining agreement is not an ordinary contract for the purchase of goods and services, nor is it governed by the same old common-law concepts which control such private contracts." *T.-C.E. Union* v. *Union Pacific R. Co.*, 385 U. S. 157 at 160-161 (1966), rehearing denied 385 U. S. 1032. And the Second Circuit has followed this rule that collective bargaining agreements are not to be forced into the molds of strict common-law contract principles. *Columbia Broad. Sys. Inc.* v. *American Record. & Broad. Ass'n.*, 414 F. 2d 1326 (2d Cir. 1969).

Further, this Court has specifically recognized that past practices and usage are to be considered in construing collective bargaining agreements. It considered such evidence in *Drake Bakeries* v. *Local 50*, 370 U. S. 254 at 259 (1962) and it reiterated this view in *T.-C.E. Union* v. *Union Pacific R. Co., supra:*

> "In order to interpret such an agreement it is necessary to consider the scope of other related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements." 385 U. S. at 161.

These conflicts with the decisions of this Court justify the grant of certiorari in this case.

3. The Decision Below Raises Significant Questions as to What Evidence May Be Considered in Interpreting Collective Bargaining Agreements.

The federal policy to be considered in formulating substantive law under § 301 is to promote industrial peace through the collective bargaining agreement. *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 578 (1960). While forcing parties to "dot every i and cross every t" may be called for in some contractual situations, it is inappropriate where the alternative to failure to agree is the strike. Application of the parol evidence rule to collective bargaining agreements would cause both companies and unions to demand such great detail while negotiating as to make it likely that neither could agree to the other's demands. Parties to collective bargaining agreements are loath to agree to change long-accepted language for fear of consequences which they are unable to predict. In either event, the federal policy of promoting industrial peace would be frustrated.

Parties to collective bargaining agreements should be permitted to show the meaning they have given to the words by their common understandings, usages and past practices. The use of words to express a complicated understanding is a venture fraught with imperfection and risk in any situation and the likelihood of imperfection is even greater in the drafting of collective bargaining agreements.

> "Issues are often settled by a general formula because the negotiators recognize they could not possibly foresee or provide for the many con-

tingencies which are bound to occur during the life of the agreement. Indeed, any attempt to anticipate and dispose of problems before they arise would, I suspect, create new areas of disagreement and thus obstruct negotiations. Sooner or later the employer and the union must reach agreement if they wish to avoid the economic waste of a strike or lockout. Because of this pressure, the parties often defer the resolution of their differences—either by ignoring them or by writing a provision which is so vague and uncertain as to leave the underlying issue open." Mittenthat, *Past Practices in the Administration of Collective Bargaining Agreements,* 59 MICH. L. REV. 1017 at 1022-23 (1961).

Our Kentucky Court has affirmed this only recently:

"Actually, it is difficult in any case to say with assurance that only one interpretation of a contract provision is possible. In ordinary commercial contracts, skilled lawyers have difficulty in stating the terms in such precise language that all ambiguity is eliminated." *United Brick & C. Wkrs., Loc. 486* v. *Lee Clay Pr. Co., Inc.,* Ky., 488 S. W. 2d 331 at 335 (1972).

In the case at bar, proof was offered of practices of 25 years standing. In addition, the bargaining history evidenced the Union's agreement to the historic meaning of the "farming out" clause, and it also explicitly confirmed and admitted the existence of the past practices. The Fifth Circuit considered such evidence in *Watson* v. *International Bro. of T., C., W. & H. of America,* 399 F. 2d 875 (5th Cir. 1968).

Past practices and usages are perhaps the most valuable tools in arriving at the true intent and purpose of collective bargaining agreements and should in fact be considered a part of the agreement:

> "The collective agreement by which the individual and the collective parties are governed is not limited to the four corners of the written instrument. It is the whole agreement, including the industrial customs, established practices, understandings and precedents which infuse the contractual words with life and meaning." Summers, *Individual Rights and Arbitration,* 37 N.Y.U.L. Rev. 362, 396 (1962).

Past practice is of such significance that one writer has suggested there should be a presumption that a practice continues in force unless repudiated during negotiations.

> "Because the contract is executed in the context of these understandings and practices, the negotiators must be presumed to be fully aware of them and to have relied upon them in striking their bargain. Hence, if a particular practice is not repudiated during negotiations, it may fairly be said that the contract was entered into upon the assumption that this practice would continue in force." Mittenthal, *Past Practices in the Administration of Collective Bargaining Agreements, supra,* at p. 1034.

The decision of the Court below in applying the parol evidence rule to force exactness in collective bargaining agreements frustrates the national labor policy of promoting industrial peace.

4. The Restrictive Approach to the Interpretation of Contracts Adopted By the Court Below Has No Application to Collective Bargaining Agreements.

Even under common-law contract rules, circumstances existing at the time the contract was made may be considered. RESTATEMENT, CONTRACTS, § 235, COMMENT *e* (1952). Circumstances and prior negotiations must be considered in determining whether or not ostensibly clear language is ambiguous. *Ludwig Honold Mfg. Co.* v. *Fletcher*, 405 F. 2d 1123, 1130 n 31 (3rd Cir. 1969).

The terms of an earlier writing are also such circumstances as must be considered. 3 WILLISTON, CONTRACTS § 628 p. 1804 (REV. ED. WILLISTON AND THOMPSON 1936). Here, the last contract prior to the adoption of the current language prohibited "farm out to any plant or plants". After General Electric bought the Owensboro operation, the phrase "to any other plant or plants" was removed leaving a clause of obscurity as compared to the earlier language. This circumstance highlights the ambiguity of the present clause and calls for other evidence to explain the meaning given it by the parties.

The common law allows the admission in evidence of usage even though it "may contradict or vary implications which otherwise would be drawn from the written or oral expressions of the parties." 3 WILLISTON, CONTRACTS, supra, § 648.[2] The practice between the two

[2] "This necessarily involves the proposition that evidence of usage may be introduced to contradict implications of fact or law

(Footnote continued on following page)

parties is such a usage. 3 WILLISTON, CONTRACTS, supra, § 660. The present "farming out" clause is incomplete. It leaves an implication to be drawn as to "where" the Company may not farm out, let out, or transfer. Usage may be considered to contradict or vary this implication, and to show that the parties intended to prohibit only the sending of work to contractors outside of the General Electric Company. This was the usage between the parties, and it was so admitted by the union representatives in the 1970 bargaining sessions.

The implication drawn by the Sixth Circuit is not only shown to be wrong by past practice and usage, but it is cast in doubt when considered in light of the circumstance that establishment of the Singapore operation was announced over a month before the contract was signed. It is hardly credible that the parties would sign a contract forbidding the activity then underway—the establishment of the Singapore plant.

The common law allows parties to give their own special and different meaning to language of a contract.

> "With Dean Wigmore (Evid. § 2465) we think that there is no reason in the nature of things why the individual parties to a transaction may not employ words or whole phrases in a particular sense irrespective of the ordinary sense." *Nicoll* v. *Pittsvein Coal Co.*, 269 Fed. 968, 971 (2d Cir., 1920).
>
> "So it is often said also that usage is admissible to explain what is doubtful but never to contradict

which in the absence of usage would have been drawn from the writing, since otherwise, there would be no point in proving the usage." 3 Williston, Contracts, *supra*, § 652, p. 1882.

what is plain. If this statement means that usage is not admitted to contradict a meaning apparently plain if proof of the usage were excluded (and this is what the statement seems naturally to mean), it is inconsistent with many decisions and wrong on principle." 3 WILLISTON, CONTRACTS, Supra, § 650, pp. 1875-1876.

Further the view that Courts can find in words but "one plain meaning" is one to be utilized with great caution if at all. "[S]uch a rule is only a 'vestigial remain of a notion prevailing in "primitive law." ' " *Langer* v. *Iowa Beef Packers, Inc.*, 420 F. 2d 365, 369 (8th Cir. 1970). The parties may have intended a meaning quite different from that which appears most obvious as is recognized in *Hurst* v. *W. J. Lake & Co.*, 141 Or. 306, 16 P. 2d 627, 89 A.L.R. 1222 (1932):

> "The flexibility of or multiplicity in the meaning of words is the principle source of difficulty in the interpretation of language. Words are the conduits by which thoughts are communicated, yet scarcely any of them have such a fixed and single meaning that they are incapable of denoting more than one thought. In addition to the multiplicity in meaning of words set forth in the dictionaries, there are the meanings imparted to them by trade customs, local uses, dialects, telegraphic codes, etc. One meaning crowds a word full of significance, while another almost empties the utterance of any import. The various groups above indicated are constantly amplifying our language; in fact, they are developing what may be called languages of

their own. Thus one is justified in saying that the language of the dictionaries is not the only language spoken in America. . . ." 16 P. 2d at 629.

* * * * * * *

"The defendant cites numerous cases in many of which the courts held that, when a contract is expressed in language which is not ambiguous upon its face the court will receive no evidence of usage, but will place upon the words of the parties their common meaning; in other words, in those decisions the courts ran the words of the parties through a judicial sieve whose meshes were incapable of retaining anything but the common meaning of the words, and which permitted the meaning which the parties had placed upon them to run away as waste material. Surely those courts did not believe that words are always used in their orthodox sense." 16 P. 2d at 630.

Professor Corbin has written:

"It is true that when a judge reads the words of a contract he may jump to the instant and confident opinion that they have but one reasonable meaning and that he knows what it is. A greater familiarity with dictionaries and the usage of words, a better understanding of the uncertainties of language, and a comparative study of more cases in the field of interpretation, will make one beware of holding such an opinion so recklessly arrived at." 3 CORBIN, CONTRACTS, § 535, pp. 17-18 (1960). See also IX WIGMORE, EVIDENCE, § 2463 (3rd ed. 1940).

While there is a conflict in the authorities as is recognized in *Hurst* v. *W. J. Lake & Co.*; 3 CORBIN, CON-

TRACTS, § 535; 3 WILLISTON, CONTRACTS § 650; and IX WIGMORE, EVIDENCE, § 2463, all *supra,* the old common law "plain meaning" rule should have no application to collective bargaining agreements as it would serve to frustrate the policy of achieving peace through ability to arrive at agreement.

The approach of the Sixth Circuit in finding the parol evidence rule in its most traditional restrictiveness applicable to exclude other evidence of the true meaning of the contract is contrary to the policy of the national labor laws.

5. The Decision Below Raises Significant Questions Concerning Abuse of Appellate Procedure By Requiring Double Appellate Review and the Opinion Reconsidering a Prior Decision On the Merits Is in Conflict With Applicable Decisions of This Court.

An appellate court may deny an extraordinary writ such as mandamus either because the remedy is not appropriate or on the merits. *Ex Parte, Bakelite Corp.,* 279 U. S. 438 (1929); *Louis* v. *Brown Township,* 109 U. S. 162 (1883); and *U. S.* v. *U. S. District Court,* 444 F. 2d 651, 655 (6th Cir. 1971), aff'd 407 U. S. 297 (1972).

If the mandamus petition is denied on the merits, the action of the Court is res judicata. *Louis* v. *Brown Township, supra; Block* v. *Commissioners,* 99 U. S. 686 (1878); *Overstreet* v. *County of Butte,* 20 Cal. Reptr. 631, 370 P. 2d 335 (1962); *Hollywood Circle* v. *Department of Alcoholic Bev. Con.,* 55 Cal. 2d 728, 13 Cal. Reptr. 104, 361 P. 2d 712 (1961); *Burdick* v. *Harbor*

Spring Lumber Co., 167 Mich. 673, 133 N. W. 822 (1911). See cases collected at Annot. 21 ALR 3d 206 (1968).

The decision below held that the question of whether Respondent was entitled to a jury trial could be reconsidered on appeal. It cited a Sixth Circuit case which had denied mandamus on the merits, *Black* v. *Boyd,* 248 F. 2d 156 (6th Cir. 1957), and a First Circuit case which had denied mandamus as inappropriate, *In re Previn,* 204 F. 2d 417 (1st Cir. 1953). The necessary assumption was that the court had denied mandamus as inappropriate as in *In re Previn,* supra, rather than on the merits. See pp. 50, 51 of the appendix hereto.

The Court erred in its assumption that it had not decided the merits in denying mandamus. The grounds argued for denial of mandamus on the merits were that the District Court had acted within its discretionary powers in allowing amendment of the complaint on the condition that the case proceed to trial without a jury. This was the sole reason given by the Sixth Circuit panel which denied mandamus as is shown by the decisional portion of its order as follows:

> "[L]eave to file an amended complaint may be granted by the court subject to reasonable conditions and that the attaching of such conditions, including the striking of a timely demand for a jury trial on issues raised by the amended complaint, is within the sound discretion of the Court; upon consideration, it is ORDERED that the petition for mandamus be, and it hereby is denied. See *Parissi* v. *Foley,* 203 F. 2d 454 (2d Cir. 1953)."

This Order does not contain any language stating either directly or by inference that mandamus was denied as inappropriate as did the opinion *In Re Previn,* supra. Even the Union understood the Sixth Circuit to have reached the merits. Its application to Circuit Justice Potter Stewart for a stay stated that the Sixth Circuit had "affirmed" the action of the District Court.

The writ of mandamus, providing an exception to the usual federal policy against "piecemeal appeals", *Black* v. *Boyd,* 248 F. 2d 156, 159 (6th Cir. 1967), does not create a right to double appeals.

Respondent did not seek certiorari from the denial of mandamus. "If [it] was not content with the first ruling, [its] remedy was by certiorari to this court. *Angel* v. *Bullington,* 330 U. S. 183." *Brownell* v. *Chase Nat. Bank,* 352 U. S. 36, 39 (1956).

The reconsideration by the Sixth Circuit of an issue it had previously decided on the merits is in conflict with the recognized principles of the common law and the decisions of this Court holding that a denial of mandamus is res judicata. The decision of the Sixth Circuit encourages multiple appellate review of identical issues.

CONCLUSION

The opinion of the Sixth Circuit ignores specific agreements made during bargaining sessions and practices which have been honored by the Company and the Union for 25 years. It jeopardizes GE's ability to remain viable in the receiving tube industry in facing offshore competitors and domestic competitors with offshore facilities and sources.

The Court of Appeals reversed not only the District Court's considered judgment as reflected in its Findings of Fact and Conclusions of Law, but its own prior decision, remanding the case for trial before a jury and prohibiting any evidence of bargaining history, past practice and usage. If GE must be subjected to a second trial, it should not be forced to again defend the Union's claim for $4 million dollars, damages and injunctive relief, handicapped by the Sixth Circuit decision excluding evidence of the specific agreements and practices showing the meaning of the collective bargaining agreement.

Because of the conflicts in the decisions of the Circuits and for the significant reasons of national policy as stated above, a Writ of Certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

MORTON J. HOLBROOK
RALPH W. WIBLE
100 St. Ann Street
Owensboro, Kentucky 42301
Counsel for Petitioner